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NO. 89-156
IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners
v.
EDWARD J. AND DEBORA A. DAVENPORT,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. RESPONDENTS HAVE NOT DEMONSTRATED A CLEAR CONGRESSIONAL INTENT TO INTERFERE WITH THE STATES' CRIMINAL JUSTICE SYSTEMS.

Rather than demonstrating a clear Congressional intent to make criminal sanctions "debts" under the Bankrutpcy Code, respondents have further demonstrated the ambiguity which clouds that intent. Respondents have cited a number of cases standing for the proposition that civil fines, penalties and forfeitures were not provable or dischargeable under the prior Bankruptcy Act. Brief of Respondents at 26, n. 18. They then posit that Section 523(a)(7) of the Bankruptcy Code pertaining to exceptions from discharge in Chapter 7 cases represents Congress' codification of the prior exclusion of fines and penalties, both civil and criminal, and state that nothing in the

text of the provision or its "sparse legislative history" suggests that Congress "intended to differentiate" between civil and criminal fines. Brief at 27.

Respondents' assertion thus demonstrates that instead of expressing a clear Congressional intent that criminal penalties be considered debts, Section 523(a)(7), upon which they rely, is, at least, ambiguous. The language of Section 523(a)(7) could easily be read to refer to <u>civil</u> fines, penalties, and forfeitures which respondents argue were non-dischargeable under the prior law. This does not then clearly indicate, even by implication, that criminal fines are to be considered "debts" under the Code. Respondents' own argument now shows that the text of Section 523(a)(7) can refer to civil, not criminal obligations. This means

that Section 523(a)(7) was not necessarily the focus of Congressional attention as to criminal fines. It also means that, read to apply to civil penalties, the language of Section 523(a)(7) is not superfluous even if criminal penalties are not "debts." The "clear intent" rule used by the Court to determine whether Congress has altered prior law in areas touching on important state and federal concerns is not met. Criminal restitution orders are not "debts" under the Bankruptcy Code.

II. PETITIONERS' CONSTRUCTION DOES NOT UNDERMINE BANKRUPTCY POLICY.

Because there is no clear expression that Congress intended to interfere with the states' criminal justice systems via the Bankruptcy Code, the Court should not concern itself with respondents' arguments that the result of reversal would circumvent "bankruptcy policy," grant petitioners a sort of super-priority status to which they are not entitled under the Bankruptcy Code, or amount to an overreaction to a perceived danger of abuse. Respondents' brief at 37-43. The proper focus of the inquiry is whether Congress meant for criminal restitution orders to be included within the scope of bankruptcy policy in the first place. Notwithstanding the general policies Congress intended to promote by enacting the Bankruptcy

Code, if it did not also clearly express its intention that criminal restitution orders be considered debts, then a debtor's obligation pursuant to these criminal orders cannot be adjusted through bankruptcy proceedings. The issue is predominantly one of statutory construction. If the obligation owed them is not a "debt," then petitioners are entitled to have the obligation remain intact, as set forth by a state court of competent jurisdiction, despite a discharge by the bankruptcy court.[1]

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[1]Respondents suggest that this result excludes from participation in Chapter 13 debtors who otherwise could adjust all of their debts, including restitution claims, in full. This is not a realistic suggestion. In discussing the likelihood of restitution

(FOOTNOTE CONTINUED ON NEXT PAGE)

Even if relevant, respondents' assumption that outstanding restitution obligations, if not considered debts, will necessarily divest the debtor's estate of funds which could otherwise be distributed to creditors and will seriously interfere with the efficacy of Chapter 13 proceedings is not correct.[2]

(FOOTNOTE CONTINUED)

obligations being paid under a Chapter 13 plan, a bankruptcy judge in In re Kohr, 82 B.R. 706 (Bankr. M.D.Pa. 1988) observed that "[t]he majority of Chapter 13 cases are filed to save the home. Most provide very small payments to unsecured creditors. I have approved plans with no payments going to unsecured creditors." Id. at 712. The Chapter 13 plan in this case called for $120 to be distributed among all creditors, including the Department of Public Welfare. Joint App. at 20a-25a. The restitution obligation was $4,144.80.

[2]Respondents also suggest that the enforcement of criminal monetary sanctions will have the effect of

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

thwarting Congressional policy that payments to crime victims receive priority over unpaid fines. They cite a page from the legislative history of the Victim and Witness Protection Act to stand for this proposition. The reference cited by respondents expresses a congressional concern that restitution be restored to priority status under federal law. The Senate Report recognized that "[t]he principle of restitution is an integral part of virtually every form of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being." S.Rep. No. 532, 97th Cong., 2d Sess. 30, reprinted in 1982 U.S. Code Cong. & Admin. News 2536. It is difficult to see how excluding criminal restitution orders from the scope of the Bankruptcy Code, the result here urged by petitioners, could defeat this policy or prejudice the rights of crime victims. To the contrary, it is logical to assume that judges will be more inclined to order restitution if they know their orders will not be negated by bankruptcy proceedings. Encouraging courts to enter restitution orders more frequently will have a salutary effect on crime victims' rights, and is consonant with the policy underlying the Victim & Witness Protection Act.

If a debtor defaults on a restitution obligation, the Pennsylvania court, as it did here, would in the ordinary course schedule a hearing to determine the reasons for non-compliance. If the reason for default were the pendency of Chapter 13 proceedings, the sentencing judge would have other options available for consideration; the judge could (1) reduce the payments in accomodation to a Chapter 13 proceeding, (2) extend the payments over a longer period, or (3) defer any further action until the bankruptcy proceedings were completed. Thus, although the possibility of conflict exists, under Pennsylvania procedures a judge would have the opportunity to consider the effect of pending Chapter 13 proceedings before any action might be taken against a

defaulting debtor. Respondents effectively suggest that determinations concerning the adjustment of criminal sanctions are best left to the bankruptcy courts, rather than to the criminal courts which imposed them. This odd suggestion is not warranted by a proper construction of the Bankruptcy Code, nor does it square with the deference the Court has always accorded states in the administration of their criminal laws. Younger v. Harris, 401 U.S. 37 (1971).

CONCLUSION

For the foregoing reasons, as well as those stated in petitioners' principal brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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